15-15143

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DENT; JEREMY NEWBERRY; ROY GREEN; J. D. HILL; KEITH VAN HORNE; RON STONE; RON PRITCHARD; JAMES MCMAHON; MARCELLUS WILEY; JONATHAN REX HADNOT, JR., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—v.—

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR NORTHERN CALIFORNIA, SAN FRANCISCO

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The operative pleading – Plaintiffs' Second Amended Complaint ("SAC") – alleged that, to enhance its profits, the National Football League ("NFL" or "League") illegally distributed controlled substances and prescription drugs (collectively "Medications") to the putative class. The SAC also alleged that the NFL did so directly and indirectly through its member clubs ("Clubs"), doctors, and trainers. The SAC contains numerous factual allegations demonstrating the NFL's control of this illicit process, allegations that must be accepted as true here.

The NFL and the District Court have seized on the allegations relating to the Clubs, doctors, and trainers, while simultaneously ignoring the allegations regarding the NFL's direction of the illegal activity at issue, to mischaracterize Plaintiffs' claims. They contend Plaintiffs are really suing the Clubs for breaching duties in certain collective bargaining agreements ("CBAs") that provide for medical treatment for NFL players and, therefore, their claims are preempted. If Plaintiffs had made those allegations, the NFL and District Court might be right about preemption. But Plaintiffs have not. The NFL's spin notwithstanding, the "gravamen" of the SAC is that the NFL directed Clubs, doctors and trainers under its control to violate federal and state law. Such actions violate one of the most basic common-law duties that exists – compliance with the law. The NFL did not so comply, and it is that violation that gives rise to Plaintiffs' claims.

This Court need only look to its *en banc* opinion in *Cramer v Consol. Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001), to understand that claims like those here are not preempted. *Cramer* stated that an employer is "required to abide by the provisions of California penal law, and its employees had a right to assume their employer would [do so]." *Id.* at 695. This Court concluded that, as "freedom from [such] illegality is a 'nonnegotiable state-law right,' a court reviewing plaintiffs' claims … need not interpret the CBA" and thus those claims were not preempted. *Id.* at 696. This case is no different. Plaintiffs had the right to assume the NFL would obey the law and the District Court need only contrast the NFL's actions with its statutory obligations to determine whether it violated its duty.

Neither are Plaintiffs' claims subject to the grievance procedures contained in the CBAs. As retirees alleging latent injuries, Plaintiffs are not part of the bargaining unit and cannot grieve their claims, a point confirmed by the National Football League Players' Association ("NFLPA" or "Association") on two different occasions to the District Court. Grievance procedures, and the related issue of remedy exhaustion, are not at issue.

In short, while Plaintiffs could have sued the Clubs, doctors, and trainers, they were not required to. They sued the entity ultimately responsible for the illegal activity – the NFL. Those are the claims this Court must adjudicate, not the NFL's spin on them. Framed properly, Plaintiffs' claims should not be preempted.

ARGUMENT

The NFL argues that Plaintiffs' claims are preempted or, in the alternative, that Plaintiffs must comply with grievance procedures that would prevent them from pursuing their claims in court. Neither argument has merit.

I. The NFL Has Identified No Valid Contract Interpretation Required to Resolve Plaintiffs' Claims.

A. The NFL Should Not Be Allowed to Rewrite Plaintiffs' Claims to Avoid the Statutory and Regulatory Duties Alleged.

1. *Plaintiffs Alleged Specific Misconduct by the NFL.*

Contrary to the District Court's erroneous assumption, the "nub" of Plaintiffs' claims are that the NFL illegally coordinated and directed the administration of Medications to its players. The SAC alleges the NFL did so directly, *see*, *e.g.*, ER1329 (alleging coordination of illegal distribution of painkillers by the NFL and that the NFL intentionally refrained from testing for painkiller misuse), ER1334 (NFL controls dispensing of painkillers throughout the League, including through contracts with pharmacies) & ER1336 (NFL required players to sign waivers for painkillers), and indirectly, *see, e.g.*, ER1321 (NFL involved its doctors in reviewing distribution and administering of painkillers), ER1331 (NFL directed teams and doctors to prioritize return to play instead of health and safety) & ER1333 (NFL pressured teams and doctors to use painkillers to hasten return to play and oversaw procurement and supplying of painkillers across the League). These allegations must be assumed to be true here.

Neither the NFL nor the District Court analyzed, much less discussed, the foregoing allegations but, rather, molded them into something else to better fit their conclusions. To the NFL (and the District Court), Plaintiffs did not allege a top-down scheme to illegally medicate players. Rather, they contend that the "gravamen" of Plaintiffs' claims is that the NFL failed to "demand proper accountability from Club medical staffs[.]" Br. of Def.–Appellee ("AB") at 5.

The NFL attempts to justify this rewrite on the basis that, in the preemption analysis, courts can assess the true "nature" of a plaintiff's claims. AB at 17 & 32. But the case-law establishing this premise makes clear that a court must determine whether the "nature" of the claims are contractual or not, *see id.* (explaining that the "true nature" to be ascertained is whether it is in fact a "section 301 claim"), not change the substance of those allegations or replace the named defendant with someone else. But that is what the District Court did, focusing on the Clubs rather than the NFL and ignoring the well-pleaded allegations that the NFL violated the law. In *Galvez v. Kuhn*, 933 F.2d 773, 777 (9th Cir. 1991),[1] this Court reversed a trial court for falling into that trap. So too should this Court.

[1] The NFL's attempt to distinguish *Galvez* is muddled. It appears to argue that *Galvez* rejected a district court's re-characterization of a plaintiff's claims without first focusing on "specific elements of the claim for relief," AB at 32, but the decision did not examine the elements of the assault and battery claims at issue. Rather, it examined the corresponding state criminal statutes to determine the claims' independence from the labor contracts. 933 F.2d at 777. That is precisely what should have occurred here.

2. *Plaintiffs Alleged Specific Duties the NFL Owed Them.*

Rather than address Plaintiffs' claims that it had a duty to abide by federal and state statutes, the NFL re-cast Plaintiffs' complaint as relying on a "common-law duty to police player health and safety." AB at 11 & 22. Elsewhere, the NFL focuses on voluntary duties and hypothesizes (incorrectly) that the duty at issue is the general duty to provide medical care, as if the Plaintiffs were suing because they didn't receive medical services (which they are not). *Id.* at 27. By reframing the claims in this manner, the NFL seeks to implicate common law duties and rights that some courts have deemed preempted.

But the primary duty at issue – a duty that this Court recognized in *Cramer* as not requiring preemption – was that the NFL must abide by federal and state law regulating, *inter alia*, the dispensation of Medications. 255 F.3d at 696. While true that Plaintiffs contend the NFL voluntarily undertook duties regarding medical care (by, for example, providing doctors for 60 years when no CBA required them to), such duties are independent of the CBAs and avoid preemption as such. *See, e.g.*, *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 377 (1990) (negligence from "voluntary undertaking," not contract, is not preempted). Lastly, Plaintiffs do not rest their claims on general duties of providing medical care or player safety, and for the reasons discussed *supra*, the NFL should not be allowed to proffer such allegations to avoid preemption.

3. *The NFL's Obfuscation of Which Entities Hold the Alleged Duties Is Irrelevant.*

The NFL's weak assertion in a footnote that the duties alleged arise from the CBAs, AB at 27 n. 6, is confusing and contradictory. The NFL seems to state that, under the CBAs, it has a "fundamental duty to provide medical care[.]" *Id.* But this runs directly counter to its argument throughout this case that the Clubs, and not the NFL, have that duty under the CBA provisions that "allocate rights and responsibilities for [medical] care between and among teams, team doctors and trainers, and the players themselves." *Id.* at 3; *see also* 16, 23, 25–26, 28 & 41.

Of course, the labor contracts may, as the NFL contends, create duties by which Clubs and physicians must abide, and those duties may also make those entities and persons liable for their role in the alleged League-wide scheme. The CBAs may even create duties for the NFL, though it is a signatory only to the 2011 CBA and only one named Plaintiff, Rex Hadnot, played pursuant to that contract. But that is of no moment. Plaintiffs do not hitch their claims to duties in the CBAs, and in any event, the NFL fails to explain how any duties it may owe Plaintiffs, all of whom (save Hadnot) played before the NFL finally signed a CBA in 2011, would arise from contracts the NFL did not sign. In short, there is no plausible indication in the record, nor any good faith basis for an argument (save perhaps against Hadnot), that the duties alleged of the NFL by Plaintiffs are created in the CBAs.

B. Plaintiffs' Claims Rely on Duties and Rights Created By Statutes and Their Implementing Regulations.

The NFL's brief gives the impression that federal and state laws have almost nothing to do with this case and that Plaintiffs' reliance on them is a recent occurrence. But Plaintiffs have, from the outset,[2] based their claims on the Controlled Substances Act ("CSA"); the Food, Drug, and Cosmetic Act (the "FDCA"); and corresponding state statutes.[3] A short examination of the SAC demonstrates as much.

In its introduction, the SAC alleged that, "[w]hile certain aspects of the NFL have changed a great deal from the time of the first Super Bowl until now, a constant throughout that time has been the NFL's violations of Federal criminal laws." ER1289. It also alleged that "[t]he NFL directly and indirectly supplied players with and encouraged players to use opioids to manage pain before, during, and after games in a manner the NFL knew or should have known constituted misuse of the medications and violated Federal drug laws." ER 1293.

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[2] The SAC imports the original Complaint's allegations regarding the federal and state statutes that form the bases for the NFL's nonnegotiable and non-delegable duties in this matter.

[3] Every state has an analogue to the CSA and FDCA, with varying additional requirements. The NFL states that "Plaintiffs have never identified any specific state laws underlying their claims." AB at 21. To the contrary, the SAC identifies, *e.g.*, California's Pharmacy Law, Calif. Code Bus. & Prof. §§4000, *et seq.*, and the Sherman Food, Drug and Cosmetic Laws, Calif. Code, Health & Safety §§109910 & 110045, as bases for their claims. ER1312.

Indeed, the SAC's first "General Allegation Applicable to All Counts" states that federal and state law regulates "the manner in which controlled substances, prescription drugs, and over-the-counter medications are obtained." ER1302. The first paragraph thereof goes on to state that:

> United States law imposes a sophisticated statutory regime that regulates the dispensation of certain medications that carry a greatly-enhanced risk or abuse and addiction ("controlled substances") and criminalizes violations of such regulations…. This regulatory regime applies to anyone involved in the dispensation of such substances, from a physician operating a solo medical practice to a multibillion-dollar machine such as the NFL.

ER1303.

Ten pages follow laying out CSA and FDCA provisions applicable to the distribution and administration of Medications. ER1303–12. Plaintiffs alleged that the CSA applied to the NFL because, *inter alia*, it engaged in the distribution of controlled substances, ER1305, and, "[f]or decades, the NFL's lack of appropriate prescriptions, failure to keep proper records, … and use of trainers to distribute Schedule II and III controlled substances to its players … violate[d] the foregoing criminal and regulatory regime." ER1309. Plaintiffs also alleged that the NFL misbranded drugs and caused them to be provided without labels, concluding that its "refusal to explain side effects, and lack of individual patient care, individually and collectively, violate the FDCA." ER1310–12.

Numerous other allegations adequately provide requisite notice that Plaintiffs relied on these statutes as the bases for the NFL's duties in this matter. For example, the SAC states that the NFL, in violation of these statutes, directed trainers to dispense pills from briefcases to players along with alcohol, ER1337, and to improperly distribute Toradol, ER1361. Plaintiffs contend that such conduct violated, *inter alia*, 21 U.S.C. §§ 822(a)(1), 825(a), 825(c), 829, and 841, and 21 U.S.C. §§ 331(b), 331(q)(1)(B), 331(s), 352(b), 352(e)(1)(B), and 352(f). ER1303–12, 1368 – 70. Consistent with these allegations, the SAC identified many potential questions of law and fact relevant to these statutes and regulations. *See* ER1346–48 (asking, *e.g.*, "Did the NFL violate the [CSA's] requirements governing …" "acquisition …," "storage …," and "distribution of controlled substances?").

The NFL downplays the prominence of the SAC's repeated reliance on federal and state laws and regulations "governing the control and distribution of their stockpiles of pills," ER1333, while the District Court largely ignored such allegations. But a straight-forward reading of Plaintiffs' complaint, coupled with the requirement that the Court take as true Plaintiffs' well-pleaded allegations that the NFL violated these statutes, suffices to withstand the NFL's attack at this stage of the proceedings.

C. Plaintiffs' Negligence *Per Se* Claim Alleged Nonnegotiable Rights and Duties that are Not Preempted.

Plaintiffs assert a claim for negligence *per se* and rely on the foregoing statutory duties as a basis for tort liability. "The violation of a statute gives to any person within the statute's protection a right of action to recover damages caused by its violation." *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 175 (9th Cir. 1997). The doctrine "does not provide a private right of action for violation of a statute;" instead, it is used to "prove duty of care and standard of care." *Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 737–38 (2010).[4]

California's elements to establish negligence *per se* are typical of the law of most states: "(1) the defendant violated a statute or regulation; (2) the violation caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect." *See Carson v. Depuy Spine, Inc.*, 365 F. App'x 812, 815 (9th Cir. 2010). The SAC lays out a well-pleaded negligence *per se* claim, *see* ER1368–70, and the NFL did not challenge that claim in its Rule 12(b)(6) motion.

[4] The foregoing pronouncement is consistent with *California Serv. Station & Auto Repair Ass'n v. Am. Home Assurance Co.*, 62 Cal. App. 4th 1166 (1998), cited by the NFL. That decision noted that "[a] duty of care … may of course be found in a legislative enactment which does not provide for civil liability." *Id.* at 1174. As to a criminal prohibition like that at issue here, *California Serv. Station* observed that such a prohibition may become "a rule of civil liability … under common law principles" and thus indicate the existence of a duty. *Id.*

Rather than scrutinize the elements of a claim properly pleaded, the NFL makes a handful of unsupported and imprecise attacks on Plaintiffs' use of the doctrine, all of which are easily disregarded. In a footnote, the NFL suggests that Plaintiffs cannot rely on negligence *per se* because the CSA and FDCA do not provide private causes of action. This argument ignores numerous cases finding that claims of negligence *per se* based on statutes without private rights of actions are generally permissible. *See, e.g., Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1008 (9th Cir. 2013). These include cases with claims based on the CSA, *see Kim v. Interdent, Inc.*, 2009 WL 3833832, at *5 (N.D. Cal. Nov. 16, 2009),[5] and the FDCA, *see, e.g.*, *Carson*, 365 F. App'x at 815; *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1040–41 (9th Cir. 2015).[6]

[5] The NFL cites, in a footnote, *U.S. v. Real Prop. & Improvements Located at 1840 Embarcadero, Oakland, Cal.*, 932 F. Supp. 2d 1064 (N.D. Cal. 2013), for the broad premise that any and all private legal actions based on the CSA are forbidden. The NFL stretches its ripped-from-context quotation from the case far beyond its application. *1840 Embarcadero* involved private claimants relying on the CSA to request injunctive relief pursuant to Fed. R. Civ. P. G(7)(a), which applies to *in rem* forfeitures in criminal proceedings. The case did not involve state tort claims. The holding in that case applies solely to Rule G(7)(a) actions and says nothing about the validity of Plaintiffs' negligence *per se* claims here. *Id.* at 1071–72.

[6] In a footnote, the NFL cites *Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1119 (9th Cir. 2013), to suggest that negligence *per se* cannot be maintained based on alleged violations of the FDCA. *Perez* spoke to so-called "fraud-on-the-FDA" claims in which plaintiffs allege that, in violation of the FDCA, a defendant failed to provide necessary disclosures to the Food and Drug Administration (the "FDA"), the federal regulatory body that enforces the statute.

Moreover, numerous decisions from this Court reject preemption by relying on statutes without private causes of action. Indeed, this Court's most important case addressing non-preemption of illegal conduct claims, *Cramer v. Consol. Freightways, Inc.* — a case barely addressed by the NFL —involved claims based on a statute without a private right of action. Those plaintiffs relied on a state constitutional provision and a penal statute to demonstrate the nonnegotiable and independent nature of the asserted rights. 255 F.3d at 693–94. *Galvez* reached similar conclusions from criminal statutes. 933 F.2d at 777 (referencing California criminal statutes for assault and battery). In short, while the criminal statutes relied on by Plaintiffs do not provide private rights of action, reliance on such statutes for a negligence *per se* claim is neither novel nor impermissible.

Perez clarified that the plaintiff was "not barred from bringing any fraud claim related to" the allegedly illegal conduct, *id.*, but rather, the claims were preempted because the FDA was "amply empower[ed] … to punish and deter fraud" against itself. *Id.* The authority underlying the case made clear that preemption was appropriate because "[p]olicing fraud against federal agencies" was a duty of the federal government. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347–48 (2001). Plaintiffs are not attempting to enforce obligations owed to a regulator; they are attempting to enforce obligations owed them. In any event, this Court recently found that *Buckman* and its progeny (including *Perez*) were limited to claims that allege fraud on the FDA, and do not preempt claims in which the illegal conduct alleged was, as here, "outside the context of the regulatory process" and had "little to do with direct regulatory interaction with the FDA." *See McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1040–41 (9th Cir. 2015). *McClellan* warned against the argument made by the NFL here, stating: "The appellees would have us conclude that any use of federal law to establish a standard of care is an attempt to enforce the underlying federal provisions, but we do not accept that proposition." *Id.*

The NFL also argues that Plaintiffs are precluded from relying on the CSA, FDCA, and corresponding state statutes unless they first identify a statute that "guarantees them a freestanding 'right [] to receive conforming medical care' from the NFL." AB at 38. This suggestion, without any legal support, builds into these detailed regulatory and criminal statutes a nonexistent limitation that they would only apply to parties operating under some independent legal obligation to provide medical care. The statutes have no such requirement; they apply to those who distribute, deliver, or dispense controlled substances and medications in all contexts, including the NFL.

D. Corresponding Provisions in Labor Contracts Are of No Consequence.

In addition to the arguments already identified, the NFL seeks to combat Plaintiffs' reliance on statutes and regulations by employing a bit of misdirection. Where the NFL (briefly) does acknowledge Plaintiffs' reliance on federal and state statutes and regulations, it quickly tries to shift the focus to tangentially related CBA provisions, stating, "Plaintiffs claim that the NFL had a duty to follow federal and state laws regarding medications[.] … [H]owever, the CBAs already contain such disclosure and compliance obligations[.]" AB at 25–26. But even if the CBAs contained the same duties as provided for by, *e.g.*, the CSA, that would not matter because a Court would not have to look to the CBAs. The CSA (or the FDCA, or whatever statute may be at issue) would suffice.

The point is well made by examining the NFL's persistent reliance on a CBA provision stating that physicians must "comply with all federal, state, and local requirements." AB at 26. If that provision required contract interpretation, meaning preemption would attach, then the NFL really would not need to argue that the CBAs mirror the CSA or FDCA because such a broad, catch-all provision as compliance with all federal laws would (of course) encompass those two statutes. But equal to its reliance on that provision is its ignorance of the fact that this Court has maintained for more than 25 years that a CBA provision stating that a party "will comply with all state and federal health and safety laws … does not … require interpretation of the contract terms; it requires an interpretation of the state law." *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987).

The statutes at issue establish duties that require no consideration of terms within the parties' contracts. The NFL's contention that "a court would have to interpret the CBA to determine whether the NFL even could assume a duty of care related to players' medical treatment" is not true. AB at 22. In directing, *inter alia*, the distribution of Medications, the NFL has a duty of care outlined by federal and state drug laws, independent of CBA terms. This duty, and the corresponding rights of the Plaintiffs, are nonnegotiable and cannot be altered by the labor contracts. *See* Plaintiff's Brief at 20–23.

The nonnegotiable nature of a duty or right (even if created by statute) is not necessarily a complete bar to preemption; if the duty or right, *e.g.*, is described in general terms, a court might need to interpret labor contracts to give substance to that duty or right. *Id.* at 19. The cases on preempted nonnegotiable rights and duties cited by the NFL are consistent therewith.[7] But the statutes at issue here outline unambiguous and precise obligations that leave nothing to the realm of private agreements (assuming the NFL was a party to one pre-2011).

Contrary to the NFL's suggestion, the CSA "explicitly defines the duty at issue," and the NFL has identified "no dispute as to what the statute[s] required." AB 41–42. Even if there was a dispute, that would be a matter of statutory interpretation, not a basis for preemption. As the NFL's own authorities acknowledge, if "[t]here [a]re no terms in the statute to be interpreted with reference to the [CBA], nor [a]re there any terms of the [CBA] to be interpreted in light of the statute," "no interpretation of the CBA [i]s necessary." *Id.* at 42–43 (citing *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1074 (9th Cir. 2007)).

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[7] For example, the NFL cites *Brown v. Brotman Med. Ctr.*, 571 F. App'x 572 (9th Cir. 2014), which held preempted a nonnegotiable state-law duty to generally "provide a safe and healthful place of employment." AB at 40–41. But the duties at issue here are far more specific, and notably, *Brown* reversed the district court's preempting of numerous other claims, including two claims based on statutory rights (from California's Fair Employment and Housing Act and Labor Code), two based on other illegal conduct (assault and battery), and another as a matter of public policy (wrongful termination), which the NFL failed to mention in its brief. *Brown*, 571 F. App'x at 574–76.

E. Interpretation of the Labor Contracts is Unnecessary.

To the extent some of Plaintiffs' claims include a reasonableness element, the activity at issue – *e.g.*, directing others to violate federal and state drug statutes – is not and cannot be reasonable and no labor contract can provide otherwise. The NFL disputes this seemingly self-evident premise, arguing that, in addition to evaluating whether or not "the League (or someone under its control) violated federal or state law," a court weighing the reasonableness of the NFL's conduct also must consider a litany of CBA provisions that supposedly speak to the activity at issue here. AB at 8–10.

As an initial matter, for reasons already discussed, a court need not review those provisions at all to adjudicate Plaintiffs' claims. Further, the NFL fails to go the extra step and explain how those provisions could make otherwise unreasonable conduct become reasonable and Plaintiffs discern no good basis for determining that they could. The mere fact that a CBA may speak to, *e.g.*, the distribution of Medications does not mean that parties can contract around the CSA and distribute Medications in an illegal manner. In any event, the NFL fails to explain how those provisions apply here; instead, it seeks to amass as many CBA provisions that may relate to medical care as possible and suggest that preemption is required by their sheer volume. But it is the nature of Plaintiffs' claims, not the number of CBA provisions a defendant can throw at those claims, that counts.

Even if the Court concluded some of these provisions would have to be interpreted (rather than considered) to resolve Plaintiffs' claims, it would be improper to — as the NFL urges this Court to do — consider all such provisions appearing in various CBAs spanning decades in weighing all the Plaintiffs' claims. CBAs that the players never agreed to and did not exist when they played could not bear on their claims. To be sure, none of these provisions whatsoever add any value to the analysis of the Plaintiffs' claims, but, even if they did, the NFL's and District Court's imprecise, kitchen-sink, one-sized-fits-all approach fails to recognize the distinct and disparate groups of players that never contracted for most of the CBA provisions cited by the NFL.

F. The NFL's Denial of Statutory or Regulatory Liability is a Question of Fact Not at Issue Here.

Despite not raising the argument below, the NFL repeatedly insists that the federal and state statutes at issue do not apply to it. AB at 38–39. In other words, the NFL contends that it could, *inter alia*, direct individuals to violate the CSA, FDCA, and numerous corresponding state statutes and never face liability, including criminal liability to federal authorities, under those regulatory regimes. While such a result would be surprising (to put it mildly), if the NFL thinks that it is beyond the purview of these statutes, it should make that argument in a motion to dismiss for failure to state a claim — not as vague justification for preemption.

Determining whether the NFL could be liable under the federal and state drug laws likely turns on whether it, *inter alia*, distributed Medications in a manner that makes it subject to those statutes. This will require, at a minimum, development of facts about who distributed the Medications; what licenses or permissions they had or did not have to do so; and the nature of their relationships to the NFL. Those questions, and others that flow from them, require discovery.[8]

G. Plaintiffs Were Justified In Relying on Statutory Obligations.

As discussed *supra*, the SAC alleges that the NFL, in engaging in the proscribed activity at issue, prevented Plaintiffs from obtaining legally required prescriptions, warnings about side effects, and informational labels on Medications, in violation of the FDCA and, as an example, the California Pharmacy Law. The NFL contends that whether or not Plaintiffs were justified in believing they would receive such prescriptions, warnings about side effects, and informational labels requires interpretation of their labor contracts, particularly, "CBA provisions on the disclosure of medical information." AB at 29. Again, the NFL is wrong.

[8] The NFL can always make this argument in moving for summary judgment. *See, e.g.*, *Kim v. Interdent, Inc.*, No. C 08-5565 SI, 2009 WL 3833832, at *5 (N.D. Cal. Nov. 16, 2009) (defendant's argument that it did not dispense controlled substances and was not subject to the CSA may be renewed "in a motion for summary judgment after the parties have conducted discovery").

The NFL's contention and the District Court's finding that Plaintiffs' claims require interpretation of "CBA provisions on the disclosure of medical information" completely ignores the actual requirements of the CSA and FDCA — statutes that mandate certain disclosures regarding medications.[9] Neither the NFL nor District Court contend (nor could they) that the CBAs purport to waive these legally required disclosures. To accept the NFL's position, this Court would have to find that, although the FDCA and state analogues such as California's Pharmacy Law delineate specific disclosures about Medications that must be made on prescriptions and labels, the NFL could contractually bargain around those laws (presumably by, as one example, giving shots to whatever players happened to line up for one, as Plaintiffs alleged they experienced). ER1337.

Of course, the NFL cannot bargain around those laws. Plaintiffs' Br. at 20–23. Plaintiffs justifiably expected to receive information about the Medications they were being administered because the law granted them that expectation. Similarly, Plaintiffs were justified in expecting that the NFL would not coordinate, control, or direct their medical providers to withhold these legally required disclosures. *See Cramer*, 255 F.3d at 695.

[9] There is no dispute between the parties that a statutory violation may give rise to common-law fraud claims; even cases the NFL cites support this premise. *See California Serv. Station*, 62 Cal. App. 4th at 1179 (noting that the violation of a statute "may be treated as … fraud" when that is the "analogous tort").

The requirements to impart delineated information and warnings to Plaintiffs, including in prescriptions and proper labels, cannot be changed by labor contracts. Nor is there any need to examine the contracts to give substance to common-law duties of disclosure such as those alleged in *Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009), and other cases cited by the NFL. In coordinating, controlling, and directing the distribution of Medications, the NFL could not withhold legally mandated disclosures.

H. The Football-Related Cases Cited by the NFL Do Not Support Preemption of Statute-Based Claims.

The NFL's stock recitation of football-related preemption cases does not seriously contradict Plaintiffs' characterization or explanation of them. *See* AB at 33. Plaintiffs do not, as the NFL insists, need to "distinguish" these cases at all, particularly as they are factually dissimilar from Plaintiffs' allegations of a vast arrangement for, and pattern of, extensive violations of numerous state and federal laws. Plaintiffs do, however, disagree with the NFL's grab-bag of disjointed citations and quotations from those cases to give the impression that they stand for things they do not. To respond succinctly:

- The NFL cites *Williams* for the general proposition that "a duty to provide [] a warning [about a particular drug] cannot be determined without examining the parties' legal relationship and expectations as established by the CBA[.]" AB at 45. That may be so (at least, in the Eighth Circuit's view) as to the

claims in that case that were based on common-law fiduciary relationships and other general tort concepts. But that is not so when the duties to provide warnings are mandated by statute, a point with which the Eighth Circuit agrees as it found claims in the *Williams* case based on statutes not preempted, something the NFL continues to avoid in its briefing.

- The parties agree that *Stringer v. NFL*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007), and *Duerson v. NFL*, No. 12C2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012), preempted tort claims because labor contracts would have to be interpreted to determine the reasonableness of the NFL's conduct. As discussed *supra*, no such evaluation is required here. Directing widespread violations of state and federal laws is not reasonable, and nothing the court could review in the labor contracts would make it reasonable.

- The NFL joins the District Court's incorrect reading of *Smith v. NFLPA*, No. 4:14-CV-01559, 2014 WL 6776306 (E.D. Mo. Dec. 2, 2014). The NFL states that, "in *Smith*, the district court held that assessing the scope of the NFLPA's duties in relation to plaintiffs' negligence and fraud claims — *i.e.*, the same types of common-law claims asserted here — 'will substantially depend on interpretation of the CBA.'" That is wrong. The *Smith* court did not consider those claims. *See id.* at *7 n. 4.

The NFL also emphasizes a recent case involving the National Hockey League. Although that case had some claims involving painkillers, *Boogaard v. NHL*, No. 13 C 4846, 2015 WL 9259519 (N.D. Ill. Dec. 18, 2015) does not further advance the ball (or puck) in the NFL's analysis. In *Boogaard*, the alleged duties were "to protect others from harm," to "keep [players] relatively safe," and "to protect [the plaintiff's] health[.]" *Id.* at *4–6. The court held that the "scope" of those duties would require interpretation of the CBA. *Id.*

Boogaard is notable not for this rather unexceptional reasoning, but because the court expressly distinguished it from the type of claims here: As noted by the court, *Boogaard* involved "sins of omission" and failed to include contentions "that the NHL gave Boogaard the addictive painkillers." *Id.* at *7. The court further noted that claims alleging a "duty not to unreasonably harm other people" would survive preemption. *Id.* at *9. Here, Plaintiffs allege that the NFL directly controlled and coordinated the distribution, delivery, dispensing, and administering of Medications to Plaintiffs. Plaintiffs also contend that the NFL induced, coordinated, and oversaw criminal conduct that unreasonably harmed others. By its own analysis, the *Boogaard* court would not preempt these types of claims alleging direct harm.

II. Contractual Grievance Procedures Do Not Apply Here.

The CBAs provide for only two types of grievances to be filed against the Clubs (not the NFL) – a non-injury grievance and an injury grievance. The injury grievance applies when a player alleges that, at the time his contract was terminated, the player was physically unable to perform the services required under the contract because an injury occurred while playing. That provision (obviously) does not apply to Plaintiffs' claims.

A non-injury grievance applies to disputes regarding the breach of specific provisions of, *e.g.*, CBAs. As discussed above, Plaintiffs allege no such dispute. The District Court, however, found that Plaintiffs were alleging such disputes and also that they had the ability to grieve their claims – an issue relevant to exhaustion of remedies, not preemption.

Though the District Court did not rule on the basis of exhaustion of remedies, the NFL now tries to seize upon its *dicta* on the subject and uphold dismissal on that basis. In so doing, the NFL argues that, even if Plaintiffs' claims do not arise from the CBAs, and even if those CBAs do not impact the duties and rights underlying those claims, and even if the CBAs do not need to be interpreted to resolve those claims, Plaintiffs nonetheless must be forced to abide by those contractual grievance procedures because the claims require "compliance with" or "application of" the CBAs. AB at 51. Not so.

As a preliminary matter, "compliance with" a CBA would not be an independent analysis from preemption — if Plaintiffs' claims demand compliance with a labor contract, they are preempted. The NFL cites no case holding otherwise. Rather, it cites a state-court case, *Jeffers v. D'Allessandro*, 681 S.E.2d 405, 415 (N.C. 2009), for the proposition that, even if claims are not preempted, they may require "application of" a CBA and therefore be subject to grievance and arbitration procedures.

Jeffers did not hold the plaintiff's claims to be subject to arbitration even if not preempted. *Jeffers* found the claims were preempted before it ever engaged in the arbitration analysis. *See id.* at 414 ("Having concluded that Jeffers' state law claims are preempted, we must still address whether the trial court properly determined that, assuming the complaint sets out a Section 301 claim for breach of the CBA, the claim was required to be arbitrated."). The court never discussed whether his claims could survive preemption but nonetheless, under a separate analysis, be subject to arbitration procedures.[10]

Plaintiffs are aware of no authority for the proposition that claims could be sufficiently independent from labor contracts as to make preemption inappropriate

[10] Similarly, the NFL's citation to *Boogaard* suggests a holding that a plaintiff's claims could be dismissed alternatively on preemption or exhaustion grounds. This is not correct; *Boogaard* followed the correct procedure of weighing whether the plaintiff had satisfied the collective-bargaining agreement's grievance procedures only after his claims were found to be preempted. *Id.* at *10-11.

yet still be subject to those contracts' grievance procedures. Plaintiffs' claims do not require "application of" the terms of the CBAs for the reasons set forth in their briefing: Plaintiffs' claims are not based on the agreements (and do not even mention them at all in the SAC), they do not seek to enforce the terms of those agreements, and they can be resolved without consideration of those agreements.[11] Plaintiffs' claims are not subject to the grievance/arbitration procedures of the CBAs.

Finally, Plaintiffs are retired players. Once employees retire, they are no longer part of the bargaining unit. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 172 (1971); *see also Eller v. NFLPA*, 731 F.3d 752, 755 (8th Cir. 2013). Courts addressing the applicability of grievance procedures to retirees have held that their ability to arbitrate is limited to disputes about benefits provided to retirees.[12] *See, e.g.*,

[11] The NFL's citation to the NFLPA's grievance against the Clubs for requiring waivers related to the administration of Toradol misconstrues the nature of that action. The Association contended that requiring such waivers improperly modified the standard players' contract without the Association's consent. ER1226. The grievance was not about the manner by which Toradol was administered. The Association's recognition that the individual teams were using the same waiver lends credulity to Plaintiffs' claims that the NFL coordinated, controlled, and directed the Clubs' and doctors' actions regarding that medication.

[12] The NFL's reference to Richard Dent's grievance against the San Francisco 49ers in 1995 neglects to mention that he was an active player at the time grieving a violation of a term in his NFL player's standard contract.

United Steelworkers of Am. v. Ret. Income Plan for Hourly-Rated Emps. of ASARCO, Inc., 512 F.3d 555 (9th Cir. 2008); *see also Eller*, 731 F.3d at 755.

That Plaintiffs cannot grieve their claims was confirmed by the NFLPA to the District Court. ER161–163. That letter verified that retirees were not part of the bargaining unit and expressed the NFLPA's understanding that retirees' ability to grieve was limited to provisions giving them specific benefits — *e.g.*, termination pay, severance pay, disability, long-term health insurance, and participation in life improvement plans. *Id.* Summing up its position, the NFLPA stated it "does not believe that any provisions of the current CBA or any provision of any former CBA would cover the specific claims asserted by the putative *Dent* class, and therefore the NFLPA does not believe that the specific claims asserted by the *Dent* class were or could have been grievable."[13] *Id.*

Moreover, every CBA signed by NFL players has stated that it is between them and the individual Clubs. The NFL was never a party to any CBA until 2011. The majority of the Plaintiffs were never in a labor-law sanctioned relationship with the NFL, and nearly all of the provisions of the CBAs relied upon by the NFL in this case apply, by their own terms, to the Clubs only.

[13] In a Dec. 2, 2014 letter, the NFLPA clarified that a "potential exception" for a player to grieve could be "retired players who are covered by the 2011 CBA." ER133. Only one named Plaintiff, Rex Hadnot, is covered by the 2011 CBA, and in any event, the NFLPA says nothing about that exception applying to the claims here.

For this reason, the NFLPA informed the District Court that, "Given that the *Dent* claims are filed against the NFL and not Club physicians or medical personnel, the NFLPA believes the specific claims asserted in *Dent* by the post-2011 retirees are not grievable under the 2011 CBA." *Id.* The grievance procedures of the labor contracts do not apply to claims by retired players against the NFL; indeed, Plaintiffs are aware of no process by which a retired player can grieve latent injuries caused by the NFL. The District Court was wrong to find otherwise, and the NFL is incorrect in arguing that the grievance procedures apply to Plaintiffs' claims regardless of whether they are preempted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's Order finding their claims preempted and remand this matter for further proceedings consistent with this Court's opinion.

Dated: February 12, 2016

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Attorneys for Plaintiffs-Appellants

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Dated: February 12, 2016

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I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is nwilson@mdattorney.com.

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